The Twenty-Year Kerfuffle
The Texas Religious Freedom Restoration Act
By Joshua A. Skinner

I. Introduction

The past twenty years have seen something of a growth industry in legislation relating to religious rights. At the federal level, Congress enacted the Religious Freedom Restoration Act of 1994 (RFRA), 42 U.S.C. § 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). 42 U.S.C. § 2000cc *et seq.* At the state level, at least sixteen states[1] have enacted their own versions of the Religious Freedom Restoration Act, whether through adoption of religious rights legislation (e.g., in Texas) or through constitutional amendment to the state constitution (e.g., in Alabama). Other, more specialized forms of religious rights legislation have been passed at the federal and state level to address more specific concerns. *See, e.g.*, Texas Religious Viewpoints Anti-Discrimination Act of 2007, TEX. EDUC. CODE §§ 25.151-.157 (addressing viewpoint discrimination in public schools). This paper focuses on the Texas Religious Freedom Restoration Act of 1999 (TRFRA), TEX. CIV. PRAC. & REM. CODE §§ 110.001-.012, the statute adopted by the Texas Legislature to provide the broadest protection for religious freedom in Texas.

II. Background

> Texas did not enact TRFRA on a clean slate. The act is a response to a twenty-year federal kerfuffle over the level of scrutiny to apply to free exercise claims under the First Amendment of the United States Constitution.

A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248, 258 (2010).

The First Amendment to the United States Constitution states, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The free exercise clause of the First Amendment was made applicable to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), but there was little case law interpreting the free exercise clause until the Supreme Court decided *Sherbert v. Verner*, 374 U.S. 398 (1963). The current controversy surrounding the free exercise clause and the protection of religious exercise stems from the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). Many academics and legislators believe that *Smith* gutted the free exercise clause by holding that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a

[1] Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. Rev. 466, 477 (2010) (Connecticut, Florida, Illinois, Rhode Island, Alabama, Arizona, South Carolina, Texas, Idaho, New Mexico, Oklahoma, Pennsylvania, Missouri, Virginia, Utah, and Tennessee).

particular religious practice. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith*). The critics of *Smith* generally argue that the compelling interest standard should apply whenever a law substantially burdens the free exercise of religion, regardless of whether the law is neutral and generally applicable.[2] The adoption of RFRA and RLUIPA by Congress and TRFRA by the Texas Legislature were direct responses to *Smith*.

A. Development of Religious Exercise Legislation

1. Pre-*Smith* Supreme Court Precedent on the free exercise clause.

The debate surrounding *Smith* centers on the question of whether the free exercise clause is designed to grant religious individuals and institutions exemptions from generally applicable laws that incidentally burden religious exercise, absent a compelling state interest in the law's enforcement, or whether the free exercise clause is designed to prevent intentional discrimination against religious exercise and religious believers.[3]

a. Before the Compelling Interest Test.

The earliest United States Supreme Court cases to discuss the free exercise clause consistently held that the free exercise clause does not exempt individuals from neutral laws of general applicability. In *Reynolds v. United States*, 98 U.S. 145 (1878), the criminal defendant sought to have his criminal conviction for bigamy vacated because, based on his religious beliefs, he believed that polygamy was right. *Id.* at 162. The Supreme Court rejected Reynolds' request for relief, holding that, through the First Amendment, "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* at 164.

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?
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> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? The permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

[2] *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); *City of Boerne v. Flores*, 521 U.S. 507, 544-65 (1997) (O'Connor, J., dissenting) (adopting McConnell's account of the original understanding of the free exercise clause).

[3] Vincent Phillip Munoz, *The Original Meaning of the Free Exercise Clause: The Evidence from the First Congress*, 31 HARV. J.L. & PUB. POL'Y 1083 (2008).

Id. at 166-67.

Throughout the following decades, the Supreme Court continued to reject claims that the free exercise clause exempted religious believers from neutral laws of general applicability. *Miles v. United States*, 103 U.S. 304, 310-11 (1881) (permitting exclusion of jurors in bigamy trial when jurors practiced or supported polygamy); *Davis v. Beason*, 133 U.S. 333, 342-43 (1890) ("It was never intended or supposed that the [free exercise clause] could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. … However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by the general consent as properly the subjects of punitive legislation."); *Jacobson v. Mass.*, 197 U.S. 11, 29 (1905) (no constitutional exemption from military service based on religious convictions). Up through at least 1940, when the Supreme Court first applied the free exercise clause to state actions, the Supreme Court noted that neutral laws of general applicability will be upheld so long as they do not wholly deny the right to preach or to disseminate religious views:

> The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. No one would contest the proposition that a State may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

Cantwell, 310 U.S. at 304.

b. ***Sherbert v. Verner* (1963)**

In *Sherbert*, the plaintiff, a member of the Seventh-day Adventist Church, was fired from her job because she was unwilling to work on Saturdays. She claimed that working on Saturday was a violation of her religious beliefs. *Sherbert*, 374 U.S. at 399. The plaintiff sought other employment but was likewise unable to find other employment because she would not work on Saturdays. *Id.* As a result, the plaintiff filed an unemployment compensation benefits claim with the State. *Id.* at 399-400. The State agency responsible for administering the program concluded that the plaintiff had not accepted available employment and was thus barred from receiving benefits under the unemployment compensation program. *Id.* at 400-401. The plaintiff brought suit alleging that the State agency had violated her right to free exercise of her religion. *Id.* at 401. The Supreme Court held that the State policy preventing the plaintiff from receiving unemployment benefits because she would not work on Saturday for religious reasons must either (1) represent "no infringement by the State of her constitutional rights of free exercise"; or (2) be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate. *Id.* at 403. The Court concluded that the State's policy imposed a substantial burden on the religious exercise of the plaintiff and that it was not justified by a compelling State interest. *Id.* at 406-408.

c. ***Wisconsin v. Yoder* (1972)**

In *Yoder*, the plaintiffs, members of Amish communities, were tried and convicted for failing to place their high-school age children in school, in violation of the State's compulsory education statute. *Yoder*, 406 U.S. at 207-08. The plaintiffs contended that the State's compulsory education statute violated their rights under the First and Fourteenth Amendments because the plaintiffs believe, in accordance with the tenets of their faith generally, "that their children's attendance at high school, public or private, was contrary to the Amish religion and way of life." *Id.* at 208-09. The Court concluded that "the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living." *Id.* at 216. The Court further held that

> the conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practices of the Amish faith, both as to the parent and the child.

Id. at 218. Finally, the Court held that the State had failed to offer interests sufficiently compelling such "that even the established religious practices of the Amish must give way." *Id.* at 221.

d. The Court Analyzes Its Pre-1990 Decisions

In *Smith* and in *Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court made note of certain limitations that the Court considered important in analyzing its pre-1990 jurisprudence. To begin with, the Supreme Court noted that there have only been two types of situations in which the Court has invalidated neutral, generally applicable laws. First, the Court noted that it used heightened scrutiny in the context of cases involving more than one Constitutionally protected right. *Smith*, 494 U.S. at 881-82; *Boerne*, 521 U.S. at 513-14. In *Boerne*, the Court specifically noted that the case of *Wisconsin v. Yoder* was such a situation because it "implicated not only the right to the free exercise of religion but also the right of parents to control their children's education." *Boerne*, 521 U.S. at 514. Second, the Court noted that it had previously used the *Sherbert* analysis, a balancing test, in cases involving state unemployment compensation rules. *Smith*, 494 U.S. at 883-84; *Boerne*, 521 U.S. at 514. However, the Court indicated that, even if it did extend *Sherbert* beyond unemployment compensation cases, it was certainly not inclined to extend *Sherbert* beyond cases involving individualized assessments. *Smith*, 494 U.S. at 884.

Also, in the Court's consideration of the Religious Freedom Restoration Act, the Court noted in *Boerne* that pre-*Smith* jurisprudence did not require that a government's compelling interest be narrowly tailored such that it was the least restrictive means of furthering the government's compelling interest. *Boerne*, 521 U.S. at 535.

2. ***Employment Division v. Smith* (1990)**

In 1990, the United States Supreme Court issued its ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990). The case concerned whether the free exercise clause of the First Amendment would

permit the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permit the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use. The Court held that the law did not violate the free exercise clause.

The Supreme Court held that the free exercise clause does not exempt individuals from complying with laws that are neutral and generally applicable. The Court noted, however, that if the law requires some sort of individualized assessment, then there would be grounds for requiring greater scrutiny of the law in question. The Court further noted that courts should not be in the business of determining the centrality of an individual's beliefs, nor whether a particular burden is a substantial burden. Finally, the Court noted that the only times a neutral, generally applicable law had failed to pass constitutional scrutiny were cases in which the free exercise rights were coupled with some other constitutional protection (hybrid rights cases) or in certain unemployment compensation benefit cases.

3. ***Lukumi v. Hialeah*** **(1993)**

In 1993, the United States Supreme Court issued its ruling in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). The case concerned a series of ordinances enacted by the City of Hialeah to prevent the Church of Lukumi Babalu Aye from practicing animal sacrifice. The applicable state law prohibited "cruelty to animals." The City concluded that all animal sacrifice is cruel because animal sacrifice does not serve a "useful" purpose. The Court concluded that the law was unconstitutional under the free exercise clause.

The Supreme Court held that a law that burdens the free exercise of religion of an individual and is not a law that is neutral and of general applicability must be justified by a compelling interest and must be narrowly tailored to further that interest. The Court noted that the case required the use of an individualized governmental assessment. Thus, the Court concluded that when individualized exemptions are available, the government must have a compelling reason to exclude those claiming a "religious hardship."

4. The Federal Religious Freedom Restoration Act of 1994

The Religious Freedom Restoration Act of 1994 (RFRA), 42 U.S.C. § 2000bb *et seq*., was enacted as a result of the Supreme Court's ruling in *Employment Division v. Smith*, 494 U.S. 872 (1990). As part of its findings of fact, Congress concluded that "governments should not substantially burden religious exercise without compelling justification" and that the pre-*Smith* structure set forth by the federal courts struck a sensible balance "between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a). In light of the legislative findings, Congress enacted RFRA (1) "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened;" and (2) "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b).

In order to fulfill its goals, RFRA stated that "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that application of the burden (1) "is in furtherance of a compelling governmental interest;" and (2) "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §

2000bb-1(a)-(b). RFRA also created a private right of action for enforcement of the rights created by the Act.

5. ***Boerne v. Flores* (1997)**

In 1997, the United States Supreme Court issued its ruling in *Boerne v. Flores*, 521 U.S. 507 (1997). The case concerned whether Congress had exceeded its authority under § 5 of the Fourteenth Amendment in enacting the Religious Freedom Restoration Act of 1993. In particular, the Court considered whether Congress was legitimately implementing the free exercise clause through § 5 of the Fourteenth Amendment by the enactment of RFRA. The Court concluded that because RFRA extended beyond the principles enunciated in *Smith* and *Lukumi*, it was not a constitutional implementation of the free exercise clause through § 5 of the Fourteenth Amendment.

The Supreme Court noted that § 5 of the Fourteenth Amendment grants Congress the authority to enact legislation in order to enforce the provisions of the Fourteenth Amendment, including the free exercise clause in that it has been deemed to be incorporated into the Fourteenth Amendment protections. However, the Court noted that Congress does not have the authority to decree the substance of the Fourteenth Amendment restrictions on the states. Thus, legislation that alters the meaning of the free exercise clause does not enforce the rights protected by that clause. The Court noted that Congress may go beyond the "enforcement" of the Fourteenth Amendment only in utilizing remedial legislation aimed at the "widespread and persisting deprivation of constitutional rights." In that context, the Court noted Congress' invalidation of literacy tests for voters because of the practices history as a tool of racial discrimination.

The Court noted that while it is possible for Congress to enact legislation as a preventative to discrimination, it must be based on legislative findings that laws were enacted based on (in this case) religious animus. However, the Court noted that RFRA was primarily aimed at removing incidental burdens on religious freedom based on laws of general applicability (like zoning laws) that were not motivated by any animus towards religion. More importantly, however, the Court noted that RFRA has "sweeping coverage [that] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Id.* at 532.

The Court also objected to the stringent test required by RFRA and noted that its "demands of state laws reflect a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *Id.* at 533. The Court noted that claims that a law "substantially burdens" the exercise of religion are almost impossible to contest. *Id.* at 534 (citing *Smith*, 494 U.S. at 887). The Court further noted that the requirement that the law be justified by a compelling interest and narrowly tailored would be a nearly impossible hurdle for many laws. *Id.*

Finally, the Court noted that Congress' attempt to rewrite *Smith* and the Court's analysis of free exercise jurisprudence is in violation of the separation of powers. *Id.* at 535-536.

B. The Religious Land Use and Institutionalized Persons Act of 2000

In response to the *Boerne* decision, after years of debate regarding the scope of a successor statute to RFRA, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). 42 U.S.C. § 2000cc *et seq.* RLUIPA substantially narrows the scope of RFRA and focuses exclusively on land use and institutionalized persons. *See* 42 U.S.C. §§ 2000cc and 2000cc-1.

C. The Texas Religious Freedom Restoration Act of 1999.

Also in response to *Boerne*, various state legislatures enacted state religious liberty legislation.[4] In Texas, the legislature enacted the Texas Religious Freedom Restoration Act of 1999 (TRFRA), TEX. CIV. PRAC. & REM. CODE §§ 110.001-.012.

III. Elements of a TRFRA Claim or Defense.

A. Substantial Burden by Governmental Agency.

Subject to certain exceptions, TRFRA prohibits a governmental agency from substantially burdening a person's free exercise of religion. TEX. CIV. PRAC. & REM. CODE § 110.003(a). In determining whether a person's free exercise of religion is substantially burdened, some courts have focused on the burden on the person's religious beliefs rather than the burden on his conduct. *Barr v. City of Sinton*, 295 S.W.3d 287, 301 (Tex. 2009). The Supreme Court expressed concern about a method that focuses on belief, because it "may require a court to do what it cannot do: assess the demands of religion on its adherents and the importance of particular conduct to the religion." *Id.* Instead, the Supreme Court tentatively suggested that courts should focus on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious express. *Id.* This burden must be measured from the person's perspective, however, and is not susceptible to a bright-line rule. *Id.* at 301-02.[5] In addition, "a burden on a person's religious exercise is not insubstantial simply because he could always choose to do something else." *Id.* at 303.

In *Barr*, the Supreme Court concluded that the City's ordinance did create a substantial burden because there were no alternate locations within or outside the City. *Id.* at 302. "[W]hile evidence of alternatives is certainly relevant to the issue [of] whether zoning restrictions substantially burden free religious exercise, evidence of *some* possible alternative, irrespective of the difficulties presented, does not, standing alone, disprove substantial burden." *Id.* Nevertheless, in referring to pre-*Smith* case law, the Supreme Court noted that religious practice is not unduly burdened merely because a church was denied use of land that was inexpensive and attractive. *Id.* at 304; *see also Elijah Group, Inc. v. City of Leon Valley*, 2009 U.S. Dist. LEXIS 92249, *42-*43 (W.D. Tex. 2009) ("Here, it is undisputed that there are alternate locations within the City and outside the City where the Church can conduct church services. The only burden the Church has demonstrates is disappointment that it cannot conduct church services at the

[4] Lund, *supra* note 1, at 477.

[5] In *Sanchez v. Saghian*, 2009 Tex. App. LEXIS 7944 (Tex. App. – Houston [1st Dist.] 2009, no pet.), the court of appeals reversed a temporary restraining order that prevented the Harris County Medical Examiner from conducting an autopsy because it would have allegedly violated the religious beliefs of the deceased. The court of appeals noted that, while the evidence established that the autopsy would violate the beliefs of Orthodox Jews, the sworn evidence did not establish that the decedent was an Orthodox Jew or that the autopsy would otherwise violate the decedent's faith. The decedent's wife did not testify or provide an affidavit and the affidavits of various rabbis only established the beliefs of Orthodox Jews in general. In *Merced v. City of Euless*, 577 F.3d 578 (5th Cir. 2009), the Fifth Circuit held that the plaintiff's practice of his religion was substantially burdened because he was unable to perform a specific religious ceremony (sacrificing a four-legged animal as part of an ordination ceremony) in his home, as required by his religion. *Id.* at 591. The court also concluded that requiring the plaintiff to meet large lot size requirements for keeping livestock, despite the fact that the animals were only present on the property for a few hours, constitutes a substantial burden. *Id.* at 591 n.15.

Property.").[6] A restriction need not be completely prohibitive to be substantial; it is enough that alternatives for the religious exercise are severely restricted. *Barr*, 295 S.W.3d at 305.

In *A.A. v. Needville Independent School District*, 611 F.3d 248 (5th Cir. 2010), the plaintiff claimed that the school district's policy relating to hair styles for boys substantially burdened his (Native American) religious belief in the wearing of hair that is visibly long. *Id.* at 260. The district argued that the plaintiff's religious freedom was not implicated because (1) other Native Americans were not opposed to wearing their hair in a manner that was not visibly long, and (2) the plaintiff and his family had been inconsistent in their expression of their religious belief. The court rejected both arguments, holding that there can be intrafaith disagreements on religious matters and that the court will not discount claimed religious beliefs "because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Id.* at 261 (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981)). The court further concluded that the district's requirement (that the plaintiff keep his long hair tucked away) would substantially burden his free exercise because it would bar him from exercising the religious practice of wearing his hair long during the entire school day and because it would identify him as "someone subject to official stigma." *A.A.*, 611 F.3d at 265-66.[7]

A "government agency" includes the state, a municipality or other political subdivision, as well as any agency thereof. TEX. CIV. PRAC. & REM. CODE § 110.001(a)(2). TRFRA applies to any ordinance, rule, order, practice, or other exercise of governmental authority. TEX. CIV. PRAC. & REM. CODE § 110.002(a). In *Barr*, the City argued that zoning ordinances are exempt from TRFRA because the claimant can always relocate elsewhere in the City or move outside it. 295 S.W.3d at 296-97. The Texas Supreme Court rejected the City's argument, holding that "ease of relocation goes to whether the burden of a zoning ordinance on a person's free exercise of religion is substantial, not to whether zoning ordinances are categorically exempt from TRFRA." *Id.*

TRFRA also applies to an act of a government agency, in the exercise of governmental authority, granting or refusing to grant a government benefit to an individual. TEX. CIV. PRAC. & REM. CODE § 110.002(b).[8]

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[6] The Supreme Court also noted favorably a Fifth Circuit decision holding that a zoning ordinance created a substantial burden on the exercise of religion among a group of Muslims because the ordinance had the effect of relegating mosques to undesirable portions of the city that were inaccessible to Muslim students who lacked automobile transportation. *Barr*, 295 S.W.3d at 304-05 (discussing *Islamic Ctr. of Miss., Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988)).

[7] The court discussed at length various pre-*Boerne* cases interpreting RFRA in the context of public schools. *Id.* In general, the cases all basically concluded that burdens on religious expression that affect a student during the entire school day will likely constitute a substantial burden. *Id.*

[8] TRFRA does not apply to the actions of individual attorneys acting in the course of litigation, despite fact that proceedings occur before a government agency (i.e., the court). *Cf. Elmakiss v. Hughes*, 2010 Tex. App. LEXIS 6185, *12-*13 (Tex. App. – Tyler 2010, no pet. h.) (rejecting TRFRA claim against individual attorney who represented plaintiff's ex-wife in prior divorce suit). However, it remains an open question as to whether TRFRA would apply to a court's enforcement of a restrictive covenant. *Cf. Voice of the Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657, 672 n.10 (Tex. App. – Austin 2005, no pet.) (noting, but not addressing, issue because TRFRA not properly briefed by church-appellant). The Waco Court of Appeals has indicated that TRFRA would apply to oath-requirements in criminal proceedings and that courts should generally accommodate religiously based requests to be permitted to give alternatives to the standard oath under penalty of perjury. *See Scott v. State*, 80 S.W.3d 184, 193 and 197 (Tex. App. – Waco 2002, pet. denied).

The "free exercise of religion" is defined broadly and includes any "act or refusal to act that is substantially motivated by sincere religious belief." TEX. CIV. PRAC. & REM. CODE § 110.001(a)(1). In *Barr*, the City of Sinton argued that Barr's free exercise of religion is not implicated by restrictions on his halfway house ministry because a halfway house need not be a religious operation. 295 S.W.3d at 300. The Supreme Court rejected the City's argument, noting that "the fact that a halfway house *can be* secular does not mean that it *cannot be* religious." *Id.* The Court held that TRFRA provides increased protection from government regulation to activities if they are conducted for religious rather than purely secular purposes. *Id.* "Just as a Bible study group and a book club are not treated the same, neither are a halfway house operated for religious purposes and one that is not." *Id.*

In order to emphasize that "free exercise of religion" should be interpreted broadly, TRFRA goes on to state,

> In determining whether an act or refusal to act is substantially motivated by sincere religious belief under this chapter, it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief.

Id.; *but see In re R.M.*, 90 S.W.3d 909, 912-13 (Tex. App. – San Antonio 2002, no pet.) (rejecting claim that patient's religious rights were substantially burdened by court-ordered psychoactive medication where patient indicated that she might, under other circumstances, have agreed to take the medication).

TRFRA is "fully applicable" to claims regarding the employment, education, or volunteering of those who perform duties (e.g., spreading or teaching faith, performing devotional services, or internal governance) for a religious organization. TEX. CIV. PRAC. & REM. CODE § 110.011(b). An organization is a "religious organization" if:

> (1) the organization's primary purpose and function are religious, it is a religious school organized primarily for religious and educational purposes, or it is a religious charity organized primarily for religious and charitable purposes; and
>
> (2) it does not engage in activities that would disqualify it from tax exempt status under Section 501(c)(3), Internal Revenue Code of 1986, as it existed on August 30, 1999.

Id.

The burden of proving a substantial burden is on the claimant. *Barr*, 295 S.W.3d at 307.

B. <u>Application of Burden to the Person in Question.</u>

The prohibition on substantial burdens does not apply if the government agency

> demonstrates that the application of the burden to the person:
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> (1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that interest.

TEX. CIV. PRAC. & REM. CODE § 110.003(b).[9] TRFRA requires that government agency to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – "the particular claimant whose sincere exercise of religion is being substantially burdened." *Barr*, 295 S.W.3d at 306 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006)). To satisfy this requirement, courts must look beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize the asserted harm of granting specific exemptions to particular religious claimants." *Id.* Courts cannot assume that zoning codes inherently serve a compelling interest, or that every incremental gain to city revenue (in commercial zones), or in incremental reduction of traffic (in residential zones), is compelling. *Id.* at 307.[10] In *Merced v. City of Euless*, 577 F.3d 578 (5th Cir. 2009), the court held that, for the City to succeed, it most demonstrate by specific evidence that the plaintiff's religious practices jeopardize the City's stated interests. *Id.* at 592.[11]

In determining whether an interest is a compelling governmental interest, courts shall "give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment to the United States Constitution." TEX. CIV. PRAC. & REM. CODE § 110.001(b); TEX. CIV. PRAC. & REM. CODE § 110.010 (municipalities retain authority held prior to *Smith*); *see also Barr v. City of Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) ("Because TRFRA, RFRA, and RLUIPA were all enacted in response to *Smith* and were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute."); *see also A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 259 (5th Cir. 2010).

While a government agency must demonstrate that the application of the burden to the person meets the compelling interest test, *id.* at 307, the government agency is not required to separately prove that the remedy and penalty provisions of a law, ordinance, rule, order, decision, practice, or other exercise of governmental authority are the least restrictive means to ensure compliance or to punish the failure to comply. TEX. CIV. PRAC. & REM. CODE § 110.003(c).

C. Claim, Defense and Remedies.

TRFRA permits a person to assert TRFRA as both a claim and a defense and further permits TRFRA to be asserted in both civil and criminal matters. TEX. CIV. PRAC. & REM. CODE §§ 110.004-.005. Any person, other than a government agency, who successfully asserts a claim or defense under TRFRA is entitled to recover:

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[9] A rule that applies to a person in the custody of a jail or other correctional facility is presumed to be in furtherance of a compelling governmental interest and the least restrictive means of furthering that interest, but the presumption is rebuttable. TEX. GOV'T CODE § 493.024. Once a party has carried its burden of production by producing some evidence to rebut the presumption, the burden of persuasion shifts to the government agency to meet the compelling interest test. *Balawajder v. Tex. Dep't of Crim. Justice Institutional Div.*, 217 S.W.3d 20, 28 (Tex. App. – Houston [1st Dist.] 2006, pet. denied) (reversing grant of summary judgment to Department in TRFRA claim by inmate that his rights were violated because he was not permitted to have additional space to store "hundreds of volumes of Hare Krishna scriptures" needed to practice his religion).

[10] *Quoting* Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 784 (1999).

[11] The court repeatedly emphasized that the plaintiff had been performing the religious practices in question (i.e., animals sacrifices) for sixteen years without incident. *Id.* at 593-94. The court did not consider whether increased urbanization in the City might have altered the relevance of the historical evidence.

(1) declaratory relief under Chapter 37 [Uniform Declaratory Judgments Act];

(2) injunctive relief to prevent the threatened violation or continued violation;

(3) compensatory damages for pecuniary and nonpecuniary losses; and

(4) reasonable attorney's fees, court costs, and other reasonable expenses incurred in bringing the action.

TEX. CIV. PRAC. & REM. CODE § 110.005(a). However, compensatory damages are limited to $10,000 for each entire, distinct controversy, without regard to the number of members or other persons within a religious group who claim injury as a result of the government agency's exercise of governmental authority. TEX. CIV. PRAC. & REM. CODE § 110.005(b). In addition, recovery of exemplary damages is not permitted. *Id.*

Actions under TRFRA must be brought in district court[12] and may not be brought against an individual for damages or declaratory or injunctive relief, unless the action is brought against an individual acting in the individual's official capacity as an officer of a government agency. TEX. CIV. PRAC. & REM. CODE § 110.005(c)-(d).[13]

A person must bring an action to assert a claim for damages under TRFRA not later than one year after the date the person knew or should have known of the substantial burden on the person's free exercise of religion. TEX. CIV. PRAC. & REM. CODE § 110.007(a); *Via NET v. TIG Ins. Co.*, 211 S.W.3d 310, 313 (Tex. 2006) (discovery rule applies to TRFRA claims). Mailing notice (see below) tolls the limitations period until the seventy-fifth day after the date on which the notice was mailed. TEX. CIV. PRAC. & REM. CODE § 110.007(b). TRFRA only applies to causes of action that accrued prior to the effective date of the Act – August 30, 1999. *Christian Acad. of Abilene v. City of Abilene*, 62 S.W.3d 217, 219 (Tex. App. – Eastland 2001, no pet.) (seeking to exempt religious school from safety regulations in building code).

D. Notice and Accommodation.

A person may not bring an action or assert a claim under TRFRA unless, sixty days before bringing the action, the person gives written notice to the government agency by certified mail, return receipt requested:

(1) that the person's free exercise of religion is substantially burdened by an exercise of the government agency's governmental authority;

(2) of the particular act or refusal to act that is burdened; and

[12] Governmental immunity is waived by TRFRA. TEX. CIV. PRAC. & REM. CODE § 110.008(a); *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 n.6 (Tex. 2003). However, since Eleventh Amendment immunity under the United States Constitution is not waived, all claims against the state must be brought in state court. TEX. CIV. PRAC. & REM. CODE § 110.008(b); *Smithback v. Crain*, 2009 U.S. App. LEXIS 4493, *3-*4 (5th Cir. 2009) (unpublished).

[13] In addition, certain statutes relating to limitations on inmate litigation are specifically exempted from TRFRA. *See* TEX. CIV. PRAC. & REM. CODE § 110.005(e). TRFRA also provides requirements regarding the handling of inmate grievances that raise religious freedom issues. *See* TEX. CIV. PRAC. & REM. CODE § 110.006(f)-(g).

(3) of the manner in which the exercise of governmental authority burdens the act or refusal to act.

TEX. CIV. PRAC. & REM. CODE § 110.006(a). However, if the substantial burden is imminent and the person did not have time to make the require notice, the person may bring a TRFRA claim during the sixty-day notice period. TEX. CIV. PRAC. & REM. CODE § 110.006(b).

A government agency that receives a notice under TRFRA may remedy the substantial burden on the person's exercise of religion. TEX. CIV. PRAC. & REM. CODE § 110.006(c). If the remedy cured the substantial burden, then the person may not bring a claim under TRFRA. TEX. CIV. PRAC. & REM. CODE § 110.006(e). A remedy implemented by a government agency:

(1) may be designed to reasonably remove the substantial burden on the person's free exercise of religion;

(2) need not be implemented in a manner that results in an exercise of governmental authority that is the least restrictive means of furthering the governmental interest, notwithstanding any other provision of [TRFRA]; and

(3) must be narrowly tailored to remove the particular burden for which the remedy is implemented.

TEX. CIV. PRAC. & REM. CODE § 110.006(d).

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